

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

Jan 18, 2024

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

BURT S.,

Plaintiff,

v.

MARTIN O'MALLEY,  
COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

No. 4:23-CV-5056-ACE

ORDER GRANTING  
PLAINTIFF'S MOTION TO REVERSE  
THE DECISION OF THE  
COMMISSIONER

ECF Nos. 10, 12

**BEFORE THE COURT** is Plaintiff's Opening Brief and the Commissioner's Brief in response. ECF Nos. 10, 12. Attorney Chad Hatfield represents Burt S. (Plaintiff); Special Assistant United States Attorney Frederick Fipps represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before the undersigned by operation of Local Magistrate Judge Rule (LMJR) 2(b)(2), as no party returned a Declination of Consent Form to the Clerk's Office by the established deadline. ECF No. 4. After reviewing the administrative record and the briefs filed by the parties, the Court **GRANTS** Plaintiff's motion to reverse the decision of the Commissioner, **DENIES** Defendant's motion to affirm, and **REMANDS** the matter for further proceedings under sentence four of 42 U.S.C. § 405(g).

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## JURISDICTION

Plaintiff filed an application for benefits on July 15, 2020, later alleging disability since June 4, 2020. The application was denied initially and upon reconsideration. Administrative Law Judge (ALJ) Marie Palachuk held a hearing on March 2, 2022, and issued an unfavorable decision on March 23, 2022. Tr. 21-39. The Appeals Council denied review on February 22, 2023. Tr. 1-6. Plaintiff appealed this final decision of the Commissioner on April 25, 2023. ECF No. 1.

## STANDARD OF REVIEW

The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th Cir. 1995). The ALJ's determinations of law are reviewed *de novo*, with deference to a reasonable interpretation of the applicable statutes. *McNatt v. Apfel*, 201 F.3d 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is not supported by substantial evidence or if it is based on legal error. *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put another way, substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). If the evidence is susceptible to more than one rational interpretation, the Court may not substitute its judgment for that of the ALJ. *Tackett*, 180 F.3d at 1098; *Morgan v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999). If substantial evidence supports the administrative findings, or if conflicting evidence supports a finding of either disability or non-disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision supported by substantial evidence will be set aside if the proper legal standards were not applied in weighing the evidence

1 and making the decision. *Browner v. Sec’y of Health and Human Services*, 839  
2 F.2d 432, 433 (9th Cir. 1988).

### 3 SEQUENTIAL EVALUATION PROCESS

4 The Commissioner has established a five-step sequential evaluation process  
5 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),  
6 416.920(a); *Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one through  
7 four, the claimant bears the burden of establishing a prima facie case of disability.  
8 *Tackett*, 180 F.3d at 1098-1099. This burden is met once a claimant establishes  
9 that a physical or mental impairment prevents the claimant from engaging in past  
10 relevant work. 20 C.F.R. §§ 404.1520(a)(4), 416.920(a)(4). If a claimant cannot  
11 perform past relevant work, the ALJ proceeds to step five, and the burden shifts to  
12 the Commissioner to show (1) the claimant can make an adjustment to other work  
13 and (2) the claimant can perform other work that exists in significant numbers in  
14 the national economy. *Beltran v. Astrue*, 700 F.3d 386, 389 (9th Cir. 2012). If a  
15 claimant cannot make an adjustment to other work in the national economy, the  
16 claimant will be found disabled. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

### 17 ADMINISTRATIVE FINDINGS

18 On March 23, 2022, the ALJ issued a decision finding Plaintiff was not  
19 disabled as defined in the Social Security Act. Tr. 21-39.

20 At step one, the ALJ found Plaintiff had not engaged in substantial gainful  
21 activity since July 15, 2020, the application date. Tr. 25.

22 At step two, the ALJ determined Plaintiff had the following severe  
23 impairments: major depressive disorder; generalized anxiety disorder; post-  
24 traumatic stress disorder (PTSD); and schizoaffective disorder. Tr. 25.

25 At step three, the ALJ found these impairments did not meet or equal the  
26 requirements of a listed impairment. Tr. 26.

27 The ALJ assessed Plaintiff’s Residual Functional Capacity (RFC) and  
28 determined Plaintiff could perform a full range of work at all exertional levels but

1 with the following nonexertional limitations: he is able to understand, remember,  
2 and carry out simple routine tasks; he is able to maintain concentration, persistence  
3 and pace for 2-hour intervals between regularly scheduled breaks; he can adapt to  
4 occasional simple changes; and he is limited to no interaction with the public, and  
5 only occasional, superficial interaction with coworkers. Tr. 28.

6 At step four, the ALJ found Plaintiff is capable of performing past relevant  
7 work as a housekeeping-cleaner. Tr. 38.

8 The ALJ thus concluded Plaintiff has not been disabled since the application  
9 date. Tr. 39.

## 10 ISSUES

11 The question presented is whether substantial evidence supports the ALJ's  
12 decision denying benefits and, if so, whether that decision is based on proper legal  
13 standards.

14 Plaintiff raises the following issues for review: (A) whether the ALJ  
15 properly evaluated the medical opinion evidence; (B) whether the ALJ properly  
16 evaluated Plaintiff's subjective complaints; (C) whether the ALJ erred by applying  
17 *Chavez*; (D) whether the ALJ erred at step three; and (E) whether the ALJ erred at  
18 steps four and five. ECF No. 10 at 4.

## 19 DISCUSSION

### 20 A. Medical Opinions

21 Under regulations applicable to this case, the ALJ is required to articulate  
22 the persuasiveness of each medical opinion, specifically with respect to whether  
23 the opinions are supported and consistent with the record. 20 C.F.R. §  
24 416.920c(a)-(c). An ALJ's consistency and supportability findings must be  
25 supported by substantial evidence. *See Woods v. Kijakazi*, 32 F.4th 785, 792 (9th  
26 Cir. 2022). Plaintiff argues the ALJ misevaluated four sets of medical opinions.  
27 ECF No. 10 at 7-17.  
28

1           **1.       *Thomas Genthe, Ph.D and David Morgan, Ph.D***

2           Dr. Genthe examined Plaintiff in January 2019, conducting a clinical  
3 interview and performing a mental status examination. Tr. 488-94. Dr. Genthe  
4 assessed a “recent” onset of schizophrenia, noting Plaintiff was hospitalized “8-9  
5 months ago” for believing he was “under surveillance.” Tr. 488, 491. Dr. Genthe  
6 assessed the severity of Plaintiff’s mental impairments as “severe” and opined,  
7 among other things, Plaintiff was severely limited in understanding, remembering,  
8 and persisting in tasks by following detailed instructions, performing activities  
9 within a schedule, maintaining regular attendance, being punctual within  
10 customary tolerances without special supervision, adapting to changes in a routine  
11 work setting, communicating and performing effectively in a work setting,  
12 maintaining appropriate behavior in a work setting, and completing a normal work  
13 day and work week without interruptions from psychologically-based symptoms.  
14 Tr. 490-91.

15           Dr. Morgan examined Plaintiff in June 2020, conducting a clinical interview  
16 and performing a mental status examination. Tr. 607-611. Dr. Morgan assessed  
17 the severity of Plaintiff’s mental impairments as “marked” and opined, among  
18 other things, Plaintiff was markedly limited in performing activities within a  
19 schedule, maintaining regular attendance, being punctual within customary  
20 tolerances without special supervision, adapting to changes in a routine work  
21 setting, communicating and performing effectively in a work setting, maintaining  
22 appropriate behavior in a work setting, and completing a normal work day and  
23 work week without interruptions from psychologically-based symptoms. Tr. 609.

24           The ALJ found both opinions “not persuasive.” Tr. 35, 36. Because the  
25 ALJ discounted these opinions on the same grounds, the Court collectively  
26 discusses the ALJ’s treatment of them.

27           The ALJ first discounted the opinions on the ground the doctors, who  
28 examined Plaintiff only once, reviewed “no records” and relied on Plaintiff’s self-

1 report. Tr. 35, 36. This ground is legally erroneous, as there is no requirement  
2 examining doctors who perform one evaluation – and necessarily assess  
3 functioning at the time of the evaluation – review treatment notes. *See, e.g.,*  
4 *Walshe v. Barnhart*, 70 F. App’x 929, 931 (9th Cir. 2003) (stating “Social Security  
5 regulations do not require that a consulting physician review all of the claimant’s  
6 background records”); *Xiomara F. v. Comm’r of Soc. Sec.*, 2020 WL 2731023, at  
7 \*2 (W.D. Wash. May 26, 2020) (“There is no requirement an examining doctor  
8 review records prior to rendering an opinion.”); *Chlarson v. Berryhill*, No., 2017  
9 WL 4355908, at \*3 (W.D. Wash. July 28, 2017) (“[N]ot reviewing plaintiff’s prior  
10 medical records is not a legitimate basis for the failure to credit fully Dr. Czysz’s  
11 opinion, as Dr. Czysz examined plaintiff and performed a MSE[.]”), *report and*  
12 *recommendation adopted*, 2017 WL 3641907 (W.D. Wash. Aug. 24, 2017); *Al-*  
13 *Mirzah v. Colvin*, 2015 WL 457800, at \*8 (W.D. Wash. Feb. 3, 2015) (“This  
14 rationale, taken to its logical extreme, would allow for the rejection of any and all  
15 medical opinions rendered prior to the admission of the claimant’s most recent  
16 treatment notes into the administrative record.”). Further, the record indicates the  
17 opinions were based on clinical observations and does not indicate either doctor  
18 found Plaintiff to be untruthful. Therefore, this is no evidentiary basis for rejecting  
19 the opinions. *Cf. Buck v. Berryhill*, 869 F.3d 1040, 1049 (9th Cir. 2017) (“The  
20 report of a psychiatrist should not be rejected simply because of the relative  
21 imprecision of the psychiatric methodology. Psychiatric evaluations may appear  
22 subjective, especially compared to evaluation in other medical fields. Diagnoses  
23 will always depend in part on the patient’s self-report, as well as on the clinician’s  
24 observations of the patient. But such is the nature of psychiatry. Thus, the rule  
25 allowing an ALJ to reject opinions based on self-reports does not apply in the same  
26 manner to opinions regarding mental illness.”) (cleaned up); *Ryan v. Comm’r of*  
27 *Soc. Sec.*, 528 F.3d 1194, 1199-200 (9th Cir. 2008) (noting an ALJ does not  
28 provide valid “reasons for rejecting an examining physician’s opinion by

1 questioning the credibility of the patient’s complaints where the doctor does not  
2 discredit those complaints and supports his ultimate opinion with his own  
3 observations”). The ALJ accordingly erred by discounting the opinions on this  
4 ground.

5       The ALJ next discounted the opinions as inconsistent with the longitudinal  
6 record, citing specifically to Plaintiff’s self-report of psychologically-based  
7 symptoms and Plaintiff’s performance on mental status examinations (*i.e.*, “calm,  
8 appropriate affect, normal speech, good eye contact”). Tr. 35, 36. This was error.  
9 As to Plaintiff’s self-report, courts have long understood that psychiatric  
10 impairments are “not as readily amenable to substantiation by objective laboratory  
11 testing as is a medical impairment and that consequently, the diagnostic techniques  
12 employed in the field of psychiatry may be somewhat less tangible than those in  
13 the field of medicine. In general, mental disorders cannot be ascertained and  
14 verified as are most physical illnesses, for the mind cannot be probed by  
15 mechanical devices in order to obtain objective clinical manifestations of mental  
16 illness.” *Lebus v. Harris*, 526 F. Supp. 56, 60 (N.D. Cal. 1981); *accord Buck*, 869  
17 F.3d at 1049; *Ryan*, 528 F.3d at 1199-2000. As to Plaintiff’s performance on  
18 mental status examinations (conducted in a close and sterile setting with  
19 psychiatric professionals), the ALJ’s stated inconsistencies are not legitimate  
20 inconsistencies: Plaintiff’s affect, speech, and eye contact are neither inconsistent  
21 with allegations of Plaintiff’s psychiatric impairments nor undermine the doctors’  
22 opined limitations concerning, among other things, Plaintiff’s ability to complete a  
23 normal workday/workweek. When evaluating medical evidence, an ALJ must  
24 present a rational and accurate interpretation of that evidence. *See Reddick v.*  
25 *Chater*, 157 F.3d 715, 722–23 (9th Cir. 1998) (reversing ALJ’s decision where his  
26 “paraphrasing of record material is not entirely accurate regarding the content or  
27 tone of the record”). The ALJ did not do so here. The ALJ accordingly erred by  
28 discounting the opinions on this ground.



1 Finally, the ALJ discounted the opinions as inconsistent with Plaintiff's  
2 activities of daily living. Tr. 35, 36. In support, the ALJ noted the following:  
3 Plaintiff "lives alone, manages personal care/hygiene/medications independently;  
4 meals, household chores, public transportation, shopping, finances; attends  
5 counseling; enjoys playing video games and collecting/watching movies." Tr. 36.  
6 These minimal activities are neither inconsistent with nor a valid reason to  
7 discount the doctor's opinion. *See Vertigan v. Halter*, 260 F.3d 1044, 1050 (9th  
8 Cir. 2001) ("This court has repeatedly asserted that the mere fact that a plaintiff has  
9 carried on certain daily activities, such as grocery shopping, driving a car, or  
10 limited walking for exercise, does not in any way detract from her credibility as to  
11 her overall disability. One does not need to be 'utterly incapacitated' in order to be  
12 disabled.") (quoting *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989)); *Reddick*,  
13 157 F.3d at 722 ("Several courts, including this one, have recognized that disability  
14 claimants should not be penalized for attempting to lead normal lives in the face of  
15 their limitations."); *Cooper v. Bowen*, 815 F.2d 557, 561 (9th Cir. 1987) (noting  
16 that a disability claimant need not "vegetate in a dark room" in order to be deemed  
17 eligible for benefits). Similarly, Plaintiff's minimal activities do not "meet the  
18 threshold for transferable work skills." *Orn v. Astrue*, 495 F.3d 625, 639 (9th Cir.  
19 2007) (citing *Fair*, 885 F.2d at 603). The ALJ accordingly erred by discounting  
20 the doctors' opinions on this ground.

21 The ALJ accordingly erred by discounting the doctors' opinions.

22 **2. Josue Reyes, ARNP**

23 ARNP Reyes, who treated Plaintiff between 2015 and 2022, prepared a  
24 medical source statement on January 11, 2022, opining, among other things,  
25 Plaintiff was "[s]everely limited: Unable to perform the demands of even sedentary  
26 work." Tr. 1155. The ALJ found this opinion "not persuasive." Tr. 37.

27 The ALJ first discounted the opinion as unsupported, noting "this opinion  
28 form is lacking in any clinical data, evidence of objective findings or testing, or



1 sufficient explanation to support the disabling level of limitation opined.” Tr. 37.  
2 However, the record makes clear that ARNP Reyes (and his practice) treated  
3 Plaintiff for a period of years before ARNP Reyes rendered his opinion. *See, e.g.*,  
4 889-946, 955-63, 1067-72. The substantial medical evidence produced by ARNP  
5 Reyes’s practice contains numerous treatment notes documenting Plaintiff’s  
6 encounters with ARNP Reyes and his colleagues and indicates these clinicians  
7 assessed, among other things, Plaintiff as suffering from varying degrees of  
8 auditory hallucinations and suicidal ideation, *see, e.g.*, Tr. 894, and depression, *see,*  
9 *e.g.*, Tr. 967. The ALJ accordingly erred by discounting the opinion on this  
10 ground.

11 The ALJ also discounted the opinion as inconsistent with the longitudinal  
12 evidence. Tr. 37. For the reasons discussed above, in the context of the opinions  
13 of Drs. Genthe and Morgan, the ALJ erred by discounting the opinion on this  
14 ground.

15 The ALJ accordingly erred by discounting the opinion.

16 **3. *Merridy Smith, MSW***

17 Ms. Smith began treating Plaintiff no later than January 2019. Tr. 618. On  
18 January 6, 2022, Ms. Smith completed a medical source statement, wherein she  
19 opined, among other things, Plaintiff had numerous severe and marked functional  
20 impairments and, based on these impairments, would be off-task at least 30% of  
21 the time during a 40-hour workweek and would miss at least 4 days per month. Tr.  
22 1157-60. The ALJ found this opinion “not persuasive.” Tr. 34.

23 The ALJ first discounted the opinion as unsupported, noting it is a “rating  
24 check-box form providing no supporting diagnoses or information about  
25 symptoms, nor evidence of any objective medical or clinical findings to support the  
26 degree of limitation opined.” Tr. 37. However, the record makes clear that Ms.  
27 Smith (and her practice, of which ARNP Reyes is also a part) treated Plaintiff for a  
28 period of years before rendering her opinion. *See, e.g.*, Tr. 612-888. Thus, the

checkbox opinion “did not stand alone[.]” *Garrison v. Colvin*, 759 F.3d 995, 1014 n.17 (9th Cir. 2014)). Further, for the reasons discussed above, in the context of the opinion of ARNP Reyes, substantial evidence does not support the balance of this finding. The ALJ accordingly erred by discounting the opinion on this ground.

The ALJ also discounted the opinion as inconsistent the longitudinal record – specifically noting “a lack of objective findings in the ongoing clinical records and treatment notes” – and inconsistent with Plaintiff’s daily activities. Tr. 37-38. For the reasons discussed above, in the context of the opinions of Drs. Genthe and Morgan, the ALJ erred by discounting the opinion on this ground.

The ALJ accordingly erred by discounting the opinion.

#### **4. *Lillie McCain, Ph.D***

Dr. McCain testified as a medical expert at the hearing. *See* Tr. 125-37. The ALJ found Dr. McCain opined Plaintiff’s “mental conditions/symptoms as identified in the record would not preclude him from working as they do not limit his ‘ability to function socially, occupationally or behaviorally.’” Tr. 33.

ALJ credited Dr. McCain’s opinion on the same grounds used to discount the opinions of the examining and treating providers discussed above. Tr. 33 (finding Dr. McCain’s opinion consistent with the ALJ’s view of the longitudinal record, Plaintiff’s self-reported symptoms, Plaintiff’s mental status examinations, and Plaintiff’s activities). Because the Court concludes the ALJ’s stated grounds for discounting these providers’ opinions were legally deficient and/or lacked substantial evidentiary support, it necessarily cannot affirm the ALJ’s crediting of Dr. McCain’s opinion.

#### **B. Subjective Complaints**

Plaintiff contends the ALJ erred by not properly assessing Plaintiff’s symptom complaints. ECF No. 10 at 18-20. Where, as here, the ALJ determines a claimant has presented objective medical evidence establishing underlying impairments that could cause the symptoms alleged, and there is no affirmative

1 evidence of malingering, the ALJ can only discount the claimant's testimony as to  
2 symptom severity by providing "specific, clear, and convincing" reasons supported  
3 by substantial evidence. *Trevizo v. Berryhill*, 871 F.3d 664, 678 (9th Cir. 2017).  
4 The Court concludes the ALJ failed to offer clear and convincing reasons to  
5 discount Plaintiff's testimony.

6 The ALJ first discounted Plaintiff's testimony as inconsistent with the  
7 medical evidence. Tr. 30-33. However, because the ALJ erred by discounting  
8 three sets of medical opinions, and necessarily failed to properly evaluate the  
9 medical evidence, as discussed above, this is not a valid ground to discount  
10 Plaintiff's testimony.

11 The ALJ also discounted Plaintiff's testimony as inconsistent with his  
12 activities. Tr. 31. However, as discussed above, the minimal activities the ALJ  
13 cites do not sufficiently undermine Plaintiff's claims. The ALJ accordingly erred  
14 by discounting Plaintiff's testimony on this ground.

15 The ALJ accordingly erred by discounting Plaintiff's testimony.

#### 16 **SCOPE OF REMAND**

17 This case must be remanded because the ALJ harmfully misevaluated the  
18 medical evidence and Plaintiff's testimony. Plaintiff contends the Court should  
19 remand for an immediate award of benefits. Such a remand should be granted only  
20 in a rare case and this is not such a case. The medical opinions and Plaintiff's  
21 testimony must be reweighed and this is a function the Court cannot perform in the  
22 first instance on appeal. Further proceedings are thus not only helpful but  
23 necessary. *See Brown-Hunter v. Colvin*, 806 F.3d 487, 495 (9th Cir. 2015) (noting  
24 a remand for an immediate award of benefits is an "extreme remedy," appropriate  
25 "only in 'rare circumstances'") (quoting *Treichler v. Comm'r of Soc. Sec. Admin.*,  
26 775 F.3d 1090, 1099 (9th Cir. 2014)).

27 Because the ALJ misevaluated the medical evidence and Plaintiff's  
28 testimony, the ALJ will necessarily need to reevaluate her *Chavez*, step three, RFC,

1 step four, and step five findings. For this reason, the Court need not reach  
2 Plaintiff's remaining assignment of error. *See PDK Labs. Inc. v. DEA*, 362 F.3d  
3 786, 799 (D.C. Cir. 2004) ("[I]f it is not necessary to decide more, it is necessary  
4 not to decide more.") (Roberts, J., concurring in part and concurring in the  
5 judgment).

6 On remand, the ALJ shall reevaluate the opinions of Drs. Genthe and  
7 Morgan, ARNP Reyes, Ms. Smith, and Dr. McCain, reassess Plaintiff's testimony,  
8 develop the record, and reevaluate the steps of the sequential evaluation process, as  
9 appropriate – including a redetermination of the RFC, as needed.

### 10 CONCLUSION

11 Having reviewed the record and the ALJ's findings, the Commissioner's  
12 final decision is **REVERSED** and this case is **REMANDED** for further  
13 proceedings under sentence four of 42 U.S.C. § 405(g). Therefore, **IT IS**  
14 **HEREBY ORDERED:**

15 1. Plaintiff's motion to reverse, **ECF No. 10**, is  
16 **GRANTED.**

17 2. Defendant's motion to affirm, **ECF No. 12**, is **DENIED.**

18 The District Court Executive is directed to file this Order and provide a copy  
19 to counsel for Plaintiff and Defendant. Judgment shall be entered for Plaintiff and  
20 the file shall be **CLOSED.**

21 **IT IS SO ORDERED.**

22 DATED January 18, 2024.



A handwritten signature in blue ink, reading "Alexander C. Ekstrom", is written over a horizontal line.

ALEXANDER C. EKSTROM

UNITED STATES MAGISTRATE JUDGE